IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6790 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JUMMADDIN @ LIYAKAT @ LALO @ MUNNO.....Petitioner

Versus

COMMISSIONER OF POLICE & TWO OTHERS.....Respondents

Appearance:

MS DR KACHHAVAH for Petitioner

MR UR BHATT ADD.PUBLIC PROSECUTOR

for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 05/02/98

ORAL JUDGEMENT

By this petition, under Article 226 of the Constitution of India, the petitioner who is the detenu calls in question the legality and validity of the order of detention passed by the Commissioner of Police, Ahmedabad City on 25th July, 1997, invoking Sec.3(2) of the Prevention of Anti-Social Activities Act (hereinafter referred to as "the Act").

2. The facts in brief leading the present petitioner to prefer this application may be stated. The Commissioner of Police, after studying the papers and complaints lodged against the present petitioner, found that the petitioner was a fiend and by his nefarious activities, he was, often giving rise to feacas and thereby, disturbing the public order. He used to snatch away the chains from the necks of the ladies passing on the road, extorting money, committing theft, robbery, possessing different weapons, without any pass or permit for committing the wrong and used to cause damage to the properties or injuries to the persons ,who failed or refused to bend his way. He was, by his nefarious activities, disturbing public order. His hellish and infernal activities disturbing public order were going berserk and that could be noticed by the Commissioner of Police, when he found that about 11 cases against him were registered in different Police Stations. The cases with regard to the offence punishable under Sec. 392 read with 114 or 379 read with 114 of I.P.C. were registered with Ellisbridge, Navrangpura, Gomtipur, Kagdapith, Vejalpur, Sabarmati and Maninagar Police Stations and in Bapunagar Police Station, a complaint with regard to the offence punishable under Sec.25(1) Arms Act was also found to have been registered. More other complaints were not registered, but the Commissioner of Police found that the petitioner had committed different criminal wrongs, putting the people to danger. He, therefore, thought to check his activities disturbing the public order. Stricter measures were required to be taken. He tried through his members of the staff to get the statements recorded, but no one was ready, to come forward to give his statements, because of the fear of violence endangering his safety. However when assurance was given to those witnesses, with great tension, they gave statements and studying those statements, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorizing the society, and upsetting the public order and leading to anarchy, when ordinary law was falling short and was sounding dull. it was not possible to check the activities. He, therefore, passed the order in question, consequent upon which the petitioner is arrested and at present is in custody.

3. On behalf of the petitioner, challenging the order, it is submitted that the order passed cannot be maintained at law, because the privilege to exercise Sec.9(2) of the Act was not in consonance with the law.

There was no material on record indicating that the authority passing the order itself was satisfied for the exercise of the privilege so as to withhold the disclosure of necessary particulars about the witnesses who gave statements. No doubt, under Sec.9 of the Act, the authority had the privilege and the same has to be exercised judiciously and not arbitrarily or capriciously. It was incumbent upon the detaining authority to satisfy that by personal application of mind, he reached the conclusion for exercising the privilege and withheld the particulars. As the particulars were not given, the petitioner was deprived of his right to have the effective representation against the detention order.

4. Mr. U.R.Bhatt, the learned APP has vehemently refuted submitting that the authority considered all the relevant materials as mentioned in the affidavit filed by the authority at Page 17 of the record and then it was found that necessary particulars about the witnesses disclosing their identity were required to be withheld so as to protect their safety which can be said to be in the public interest. As submissions on no other ground are advanced, I will confine to the governed on which both have agreed.

5. It would be better if the law about non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension

expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, it is made clear, that the authority has to personally satisfy that it was against the public interest to make such disclosure. The detaining authority has, thereby, to show that it applied the mind to all the factors emerging on record. It should also be shown that he applying his mind personally dissected the report made by his other officers, verified

about the entity of the witnesses and reliability and truthfulness of the report, and inquiry made by his other officers or agency, and also considered general background, character, antecedents, criminal or retaliative tendency or propensity of the detenu and his craze for lynch-law and such other matters as are relevant in the context of the informant. No doubt, the affidavit is filed but there nothing in the affidavit filed by the authority passing the order that he accordingly as made clear in the case of Bai Amina W/o Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others, 22 G.L.R. 1186 considered the case for the exercise of privilege, and after careful study, he was satisfied that facts on record were dictating non-disclosure of the facts in public interest viz. safety of the witnesses. What becomes clear reading the affidavit is that the authority i.e. Police Commissioner entrusted the task to the Assistant Commissioner, and he simply reposing full trust that everything must have been done rightly, accepted the report and opinion expressed by the reporting officer which is neither sufficient not legal being impermissible in law. In fact, there is no personal application of mind for being satisfied about the exercise of the privilege. For not disclosing necessary particulars of the witnesses, the case is not made out. The petitioner was, therefore, entitled to have those particulars. As those particulars are not supplied, his right to make effective representation is jeopardised, and therefore, continued detention is bad in law. The order of detention is, therefore, required to be quashed.

7. Faced with such a situation, the learned A.G.P. Mr.Bhatt, drawing my attention to a case of Mohmad Sarif v. Commissioner of Police, reported in 1997(1) G.L.H. 1017, has submitted that the high officer, having high calibre and integrity, assigned with the task by the authority records the statements and makes a report forming certain opinion, and his report is accepted by the authority passing the order of detention, it will satisfy the requirements of S.9(2) of the Act. In that case, exercise of the privilege, will certainly be in consonance with the requirements of law. This contention can not be accepted. As per the law made clear hereinabove, the authority passing the detention order has to be personally satisfied for the exercise of the privilege, by application of mind even if he has deputed the officer of high calibre and integrity for recording the statements and making report. The report made and apprehension expressed by the witnesses are just, and well based and not hollow or banal or trite must

considering other materials, be determined by the authority. In the decision cited by learned AGP it is made clear that in such matters when the life and liberty of the citizens are put to jeopardy without trial and the detention orders are passed, the approach of the Court at no stage should be casual. But the court must be, in my view, touchy qua dissatisfaction of the requirements of law. What is further held in that case is that after the receipt of the statements recorded through the subordinate officer, the Authority passing the order has to apply the mind and consider other contemporaneous evidence, on the basis of which the opinion has not only to be formed, but in the body of the order, it must also appear that the Authority had applied the mind. Mere reproduction of the statements in the body of the order is not sufficient. In the case on hand, it is not made clear in the affidavit filed by the Authority, passing the order, what other facts and material he considered while appreciating the danger expressed by the witnesses in their statements. The witnesses were also not called and interviewed. It seems, simply he accepted what was reported and stated by the witnesses, and, therefore, his satisfaction, even if there be any, must be held to be the satisfaction, without application of mind, and due ascertainment about the entity of witnesses. The requirements of law are not satisfied. When that is the case, the privilege exercised cannot be held to be just and proper and concealment of particulars cannot be said to be necessary in the public interest. The decision of Mohma Sarif V. Commissioner of Police (Supra), on which the learned A.G.P. relies upon, can not, for these reasons, help him. It seems learned AGP has misread the same.

8. Further in the case of Ramchandra Keshav vs. Govind Joti Chavare AIR 1975 SC 915, what is made clear is that where a power is given to do a certain thing in a certain way or manner, the things must be done in that way or manner and not at all, an other ways or manners or methods of performance are necessarily forbidden. Under the Act, the authority passing the order has to, by personal study, satisfy about the exercise of the privilege, and is not supposed to simply accept what is reported or opined by other officer/agency entrusted with the task of inquiry for satisfaction. As found hereinabove the Police Commissioner has not applying mind satisfied himself qua exercise of discretion; and so omission to furnish the particulars under the guise of public interest can not be justified. The contention raised, therefore, fails.

9. In the result, the order being devoid of any merit is required to be set aside. The application is hereby allowed. The order of the detaining authority dt. 25th July, 1997 is set aside, and the petitioner is ordered to be set at liberty forth with, if no longer required in any other case. Rule accordingly made absolute.

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